Supreme Court, U.S.
FILED
APR 26 2010
OFFICE OF THE CLERK

No. 09-1160

In the Supreme Court of the United States

J.P. MORGAN CHASE & CO.,
Petitioner,

v.

ANDREW WHALEN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For The Second Circuit

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE MORTGAGE BANKERS ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Ira D. Hammerman
Kevin M. Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Ave., N.W.
Washington, DC 20005
(202) 962-7382

Allan Dinkoff
Counsel of Record
Adam Banks
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
allan.dinkoff@weil.com
Counsel for Amici Curiae

Additional Counsel Listed Inside Cover

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Kenneth A. Markison
MORTGAGE BANKERS
ASSOCIATION
1331 L Street, N.W.
Washington, D.C. 20005
(202) 557-2930

Gregory Taylor
AMERICAN BANKERS
ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5028

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE PETITION 5

I. The Circuits Are Divided Over the Proper Application of the Administrative Exemption to the FLSA Overtime Requirements 5

A. The Circuits Are Divided Over The Proper Use of the Administrative-Production Dichotomy 7

B. The Circuits Are Divided Over the Breadth of "Production" 9

C. The Circuits Are Divided as to Whether Payment of Incentive Compensation Is Evidence that a Job is Non-Exempt 10

II. The Division in the Circuits over the Application of the Administrative Exemption Generates Uncertainty For Employers About the Status of Jobs Traditionally Viewed as Exempt 12

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Acs v. Detroit Edison Co., 444 F.3d 763 (6th Cir. 2006) 11

Bothell v. Phase Metrics, Inc., 299 F.3d 1120 (9th Cir. 2002) 7, 8

Cash v. Cycle Craft Co., Inc., 508 F.3d 680 (1st Cir. 2007) 13

Fife v. Harmon, 171 F.3d 1173 (8th Cir. 1999) 11

Kennedy v. Commonwealth Edison Co., 410 F.3d 365 (7th Cir. 2005) 11

Reich v. John Alden Life Ins. Co., 126 F.3d 1 (1st Cir. 1997) 9

Roe-Midgett v. CC Servs., Inc., 512 F.3d 865 (7th Cir. 2008) 7

Schaefer v. Ind. Mich. Power Co., 358 F.3d 394 (6th Cir. 2004) 8

Shaw v. Prentice Hall Computer Publ'g, Inc., 151 F.3d 640 (7th Cir. 1998) 7, 8

Webster v. Pub. Sch. Employees of Wash., Inc., 247 F.3d 910 (9th Cir. 2001) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Regulations

29 C.F.R. § 541.2 (2003) 6

29 C.F.R. § 541.205(a) 6

29 U.S.C. § 201 1

29 U.S.C. § 213(a)(1) 5

Other Authorities

Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed Reg. 22,122, 22,145 (Apr. 23, 2004) 6

Jones Day, *Preparing for Increased Wage and Hour Litigation and DOL Enforcement*, Apr. 2010, http://www.jonesday.com/preparing_for_increased_wage/ 1

Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560, 15,566 (Mar. 31, 2003) 7

INTEREST OF *AMICI CURIAE* [1]

Amici's member firms employ tens of millions of people, many of whom are classified as "exempt" from overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* The exempt status of employees has been subject to growing litigation over the last decade, with FLSA cases more than tripling between 2000 and 2009.[2] With this increase in litigation, employers have faced growing uncertainty as to whether their employees are properly classified. The Second Circuit's recent decision that is the subject of this petition promises to exacerbate that problem by staking out an extreme position at odds with the positions taken by the First, Sixth, Seventh, Eighth, and Ninth Circuits. The national employers represented by the *amici* here thus

---

[1] All parties have consented to the filing of this brief. The consent letters have been filed with the Court. Counsel of record for Petitioner and Respondent's counsel of record below received notice of *amici curiae*'s intent to file this brief more than ten days before the due date. Respondent's current counsel of record received notice on April 21, 2010 and consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] See Jones Day, *Preparing for Increased Wage and Hour Litigation and DOL Enforcement*, Apr. 2010, http://www.jonesday.com/preparing_for_increased_wage/ ("In the last decade, the number of cases involving FLSA claims has increased significantly, from 1,888 cases filed in federal courts in 2000 to 6,144 in 2009.").

face both conflicting rules for identical jobs in different circuits and an increase in litigation in the Second Circuit, as plaintiffs shop for the most favorable forum.

Amicus SIFMA, The Securities Industry and Financial Markets Association, brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state chartered. ABA member banks hold the majority of the

domestic assets of the banking industry in the United States.

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.

SUMMARY OF ARGUMENT

The FLSA exempts from overtime requirements employees who are employed in a bona fide administrative capacity, among other categories of employees not at issue here. In the case below, the Second Circuit held that an underwriter at J.P. Morgan Chase & Co., with the authority to make binding credit decisions on Chase's behalf of up to an aggregate $2.5 billion, did not fall under the FLSA's administrative exemption.

Whether an employee qualifies for the administrative exemption has been an area of growing litigation, driven in part by increasing difficulties in adapting industrial-age tests to the modern service economy. In light of these difficulties, several circuit courts of appeals have concluded that one such test, known as the "administrative-production dichotomy," should be applied only as one of several factors in determining whether a particular job fits within the administrative exemption.

In its recent decision, however, the Second Circuit departed from these other circuits and applied the administrative-production dichotomy as dispositive. Further departing from the other courts, the Second Circuit adopted a broad definition of "production," potentially sweeping in a far wider range of jobs under the overtime requirements.

The result of this division in the circuits is ambiguity and uncertainty. The same jobs that are classified as exempt from overtime in some jurisdictions may be classified as non-exempt in others. The division creates confusion, particularly for nationwide employers, like *amici*'s members, who must struggle to understand and comply with different classification standards across the country. And the division almost certainly means more, rather than less litigation.

The same is true with respect to the Second Circuit's *sui generis* approach to the question whether additional compensation can be paid for enhanced productivity without destroying the exemption. By splitting with the Sixth, Seventh, and Eighth Circuits, the Second Circuit has created an impossible situation, where national employers must either abandon such compensation entirely for otherwise exempt positions or employ a patchwork compensation structure, paying people employed in the same job differently depending on whether they work inside or outside the Second Circuit.

This Court's intervention is necessary to resolve the diverging approaches among the circuit courts and to bring needed certainty to an area of the law affecting tens of thousands of employers and millions of workers. Absent this Court's resolution of the circuit splits, *amici*'s members face conflicting and confusing rules on an important overtime exemption. This makes it difficult for them to arrive at consistent and correct decisions about their employees' overtime status, exposing them to burdensome litigation and large damage awards because the rules are just unclear.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over the Proper Application of the Administrative Exemption to the FLSA Overtime Requirements

The FLSA exempts from its overtime requirements persons who are "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). As is relevant here, applicable regulations of the Department of Labor (DOL) define an "employee employed in a bona fide . . . administrative . . . capacity" as any employee (1) who draws a salary of at least $250 a week; (2) whose "primary duty" consists of the performance of "office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers"; and (3) who "customarily and regularly exercises discretion

and independent judgment." 29 C.F.R. § 541.2 (2003).[3]

The DOL interpretive regulations describe, as one of several tools sometimes useful in determining whether work is "directly related to management policies or general business operations," a distinction between "activities relating to the administrative operations of a business" and "'production' or, in a retail or service establishment, 'sales' work." 29 C.F.R. § 541.205(a). Traditionally, courts have applied this distinction, commonly known as the "administrative-production dichotomy," only as one of several factors in the analysis of whether an employee qualifies as exempt under the FLSA's administrative exemption. The Second Circuit, however, has split from the other circuits that have considered the question, and has applied the administrative-production dichotomy as the dispositive factor, sowing uncertainty for employers operating nationwide. It compounded the confusion by adopting an expansive definition of "production" and adopting a contrary position on whether incentive compensation affects a position's exempt status. This Court's attention is necessary to resolve this important conflict.

---

[3] Effective August 2004, new DOL regulations increased the minimum salary requirement to $455 per week, but otherwise made no substantive changes to the test for the administrative exemption. See *Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 69 Fed Reg. 22,122, 22,145 (Apr. 23, 2004). *Amici*, like the Petitioner, cite to the pre-August 2004 regulations.

A. The Circuits Are Divided Over The Proper Use of the Administrative-Production Dichotomy

The administrative-production dichotomy is an industrial-age construct that DOL itself has observed "is difficult to apply uniformly in the 21st century workplace." *Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 68 Fed. Reg. 15,560, 15,566 (Mar. 31, 2003). The archetypal example of the dichotomy, the Seventh Circuit has observed, "is a factory setting where the 'production' employees work on the line running machines, while the administrative employees work in an office communicating with customers and doing paperwork." *Shaw v. Prentice Hall Computer Publ'g, Inc.*, 151 F.3d 640, 644 (7th Cir. 1998).

As a result of this "industrial age genesis," the Seventh Circuit held, the administrative-production dichotomy "is only useful by analogy in the modern service-industry context." *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 872 (7th Cir. 2008). Thus, the administrative-production dichotomy is "not terribly useful" when the employee's job duties involve "neither working on a manufacturing line nor 'producing' anything in the literal sense." *Id.* at 872–73.

The Ninth Circuit has come to the same conclusion, holding that the administrative-production dichotomy is "useful only to the extent that it helps clarify the phrase 'work directly related to the management policies or general business operations.'" *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1126

(9th Cir. 2002) (internal citation omitted). Observing that the regulation from which the dichotomy comes "does not stand alone," the Ninth Circuit held that the dichotomy is "but one analytical tool, to be used only to the extent it clarifies the analysis." *Id.* at 1126, 1127. Under the Ninth Circuit's approach, the dichotomy is rarely dispositive: "Only when work falls 'squarely on the "production" side of the line,' has the administrative/production dichotomy been determinative." *Id.* at 1127.

The Sixth Circuit has followed the Seventh and Ninth Circuits in holding that the administrative-production dichotomy is not usually dispositive. "The administrative versus production analysis," the Sixth Circuit held, "does not fit all cases." *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394, 402 (6th Cir. 2004). "The analogy—like various other parts of the interpretive regulations—is only useful to the extent that it is a helpful analogy in the case at hand, that is, to the extent it elucidates the phrase 'work directly related to the management policies or general business operations.'" *Id.* at 402–03 (citing *Bothell*, 299 F.3d at 1126; *Shaw*, 151 F.3d at 644); *see also Renfro v. Ind. Mich. Power Co.*, 370 F.3d 512, 517–18 (6th Cir. 2004).

By contrast, the Second Circuit took a divergent approach in the case at issue here. Rather than using the administrative-production dichotomy as one of several tools in the analysis, the Second Circuit applied the dichotomy as the dispositive factor in determining whether the employee was exempt under the administrative exemption, holding that "[e]mployment may thus be classified as belonging in

the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not." Pet. App. 5; see also Pet. App. 13 ("[T]he job of underwriter as it was performed at Chase falls under the category of production rather than of administrative work.").

B. The Circuits Are Divided Over the Breadth of "Production"

The circuits are also divided over how to draw the line between "production" work and "administrative" work when applying the dichotomy. The issue is of limited importance if the administrative-production dichotomy is only one of several factors in the analysis, but it becomes critically important under the Second Circuit's approach when the dichotomy is dispositive.

The First Circuit has classified jobs as "production" jobs only when they are directly related to the production of an employer's goods or services. See *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 9 (1st Cir. 1997) (production jobs "generate (i.e., 'produce') the very product or service that the employer's business offers to the public"). The Sixth Circuit has echoed this formulation, and has noted that "[w]hen employees engage in work that is ancillary to an employer's principal production activity, those employees are administrative." *Renfro*, 370 F.3d at 517 (internal quotation marks and citation omitted).

The Ninth Circuit has similarly understood that the line between "production" work and "administrative" work must be drawn narrowly. That court

has emphasized that the dichotomy must be applied "sensibly" with the goal "to clarify the meaning of 'work directly related to the management polices or general business operations,' [and] not to frustrate the purpose and spirit of the entire exemption." *Webster v. Pub. Sch. Employees of Wash., Inc.*, 247 F.3d 910, 916 (9th Cir. 2001). The Ninth Circuit also observed that there is a risk that a broad definition of "production" could "defeat the purpose of the administrative exemption," because even a company's president or CEO is somehow involved in the production of a company's products. See *id.*

The Second Circuit, by contrast, has taken a different approach, adopting a much more expansive definition of "production," holding that a job can be classified as "production" if it "*concerns* the 'production'" of the employer's fundamental product or service. See Pet. App. 12 (emphasis added). This more expansive definition of "production" sweeps a broader range of jobs into the administrative category than the narrower definition applied by the First, Sixth, and Ninth Circuits.

C. The Circuits Are Divided as to Whether Payment of Incentive Compensation Is Evidence that a Job is Non-Exempt

The circuit courts are also divided on the question whether the payment of incentive compensation is evidence that a job is a "production" job and thus is non-exempt. As Petitioner notes, the Sixth, Seventh, and Eighth Circuits have held that the payment of additional compensation beyond salary

does not render an employee non-exempt. See Pet. at 20-21.[4] The Second Circuit, however, departed from these other courts, holding that the payment of additional compensation for improved productivity was evidence that a job was a "production" job and thus non-exempt. See Pet. App. 12-13 (holding that the ability to quantify an employee's work is evidence that the job is a "production" job rather than an "administrative" job).

The Second Circuit's departure from the Sixth, Seventh, and Eighth Circuits threatens to undermine compensation systems used by numerous employers. On compensation issues in particular, national uniformity is necessary, lest employers be allowed to pay incentive compensation for enhanced productivity in some places but not in others to employees performing identical jobs. Such a patchwork compensation system is expensive to administer, unfair to the employees, and disruptive of corporate efforts to create a consistent culture throughout their organizations.

---

[4] See *Acs v. Detroit Edison Co.*, 444 F.3d 763, 768 (6th Cir. 2006); *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 370 (7th Cir. 2005); *Fife v. Harmon*, 171 F.3d 1173, 1175 (8th Cir. 1999).

II. The Division in the Circuits over the Application of the Administrative Exemption Generates Uncertainty For Employers About the Status of Jobs Traditionally Viewed as Exempt

The division in the circuits thus has a two-fold effect on the application of the administrative exemption. In adopting a more expansive definition of "production," the Second Circuit's approach has the potential to sweep in a broader range of jobs when applying the administrative-production distinction. And, because the Second Circuit's approach applies the administrative-production dichotomy as the determinative factor, that more expansive definition of "production" takes on greater importance than it would in the other circuits that do not apply the dichotomy as dispositive. This division thus has the potential to sow confusion among employers, particularly those operating nationwide and subject to diverging approaches to the application of the administrative-production dichotomy.

For example, consider a nationwide general manufacturer, like several of *amici*'s members, that has in-house employees who negotiate the final terms and conditions for the sales of its products to distributors and retailers after a salesperson makes the initial sale. Courts applying a relatively narrow definition of "production" might find that these employees are exempt under the administrative exemption because although they are negotiating sales of the manufacturer's products, they are not directly involved in generating the manufacturer's goods.

But under the broader definition of "production" applied in the Second Circuit, these employees may well be non-exempt. This approach might characterize the business objective of the employer as "producing" sales of the manufacturer's goods. And the employee's work in negotiating the terms and conditions of sales of the goods with potential buyers might "concern" the production of those sales. Under this analysis, these workers might be non-exempt, further complicating the efforts of a national manufacturer to comply with the FLSA's requirements with a nationwide approach.

Another example is a customer relations manager for a retail outlet. In *Cash v. Cycle Craft Co., Inc.*, 508 F.3d 680 (1st Cir. 2007), the court held that an employee of a motorcycle shop whose primary duties included ensuring that the store's motorcycles were properly outfitted and delivered, and following up with customers to "make sure they were happy with the service they were receiving" was exempt. *Id.* at 685. On these facts, the Second Circuit's analysis likely would have arrived at a different result. The customer-relations manager's duties clearly "concerned" the production of his employer's product, motorcycle sales. And applying the dichotomy as the determinative factor, as the Second Circuit has done, means that employees in such cases might be non-exempt, even if other factors pointed in the opposite direction. As a result of the Second Circuit's decision in this case, national employers, like many of *amici*'s members, who employ customer-relations workers exercising these types of job duties

now confront ambiguity about the proper classification of their employees.

A similar ambiguity faces dozens of other types of workers employed by other of *amici*'s members. For example, many of SIFMA's members offer their clients "margin" accounts, which allow clients to purchase securities without paying the entire purchase price. The amount of margin a client must post can fluctuate based on the value of the securities: if the securities decline in price, the client generally must post additional margin; if the securities appreciate, then the client may be able to access additional margin. SIFMA members employ people to approve and monitor these accounts. And, under the analysis of the Sixth, Seventh, and Ninth Circuits, these jobs have traditionally been viewed as exempt. Their duties are directly related to the management policies or general business operations of their employer, and they exercise considerable independent judgment and discretion in deciding whether to extend margin, whether to demand additional margin even if not required by the relevant regulations, and whether to grant customers additional time to meet margin calls.

The status of such workers is much more uncertain under the Second Circuit's approach that applies the administrative-production dichotomy as the dispositive factor. In applying the dichotomy, the Second Circuit explained that, in its view

> the context of a job function matters: a clothing store accountant deciding whether to issue a credit card to a con-

> sumer performs a support function auxiliary to the department store's primary function of selling clothes. An underwriter for Chase, by contrast, is directly engaged in creating "goods" – loans and other financial services – produced and sold by Chase.

Pet. App. 14.

Under the Second Circuit's analysis, it is far from clear on which side of the administrative-production line the margin account worker would fall. In some sense, the margin account workers are similar to the store accountants, deciding whether to extend credit to one of the stores' customers. On the other hand, a court might accept a plaintiff's argument that the employers' financial products are the margin accounts themselves, and thus these margin account workers are making decisions "concerning" the production of those financial products. Under the Second Circuit's analysis, therefore, these workers could potentially be non-exempt.

The ambiguity in all of these examples highlights the limited utility of the administrative-production dichotomy in the modern service economy. At times it can be informative but often it is not, and rarely is it dispositive. This is why many circuits have eschewed a bright line rule, and why the Second Circuit's approach will sow so much confusion.

One likely result of the confusion and ambiguity created by the division in the circuits is increased litigation. The Second Circuit below observed that DOL had grown increasingly troubled by the growing litigation in this area, and the divergent approaches taken by federal courts examining FLSA claims. See Pet. App. 9. Unfortunately, the Second Circuit's decision widens, rather than narrows, the disagreement among these courts, and will likely result in increased, rather than decreased, litigation over the consistent application of the FLSA exemptions. This Court's intervention is warranted to stem the tide of this growing litigation and to harmonize the approach taken by federal courts in applying the FLSA exemptions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ira D. Hammerman
Kevin M. Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Ave N.W.
Washington, DC 20005
(202) 962-7382

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Kenneth A. Markison
MORTGAGE BANKERS ASSOCIATION
1331 L Street, N.W.
Washington, D.C. 20005
(202) 557-2930

Allan Dinkoff
Counsel of Record
Adam Banks
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
allan.dinkoff@weil.com

Gregory Taylor
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5028

Dated: April 26, 2010